

No. SC92927

IN THE
Supreme Court of Missouri

SHEENA EASTBURN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the McDonald County Circuit Court
Fortieth Judicial Circuit
The Honorable Timothy W. Perigo, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
(573) 751 3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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STATEMENT OF FACTS

Ms. Eastburn appeals the denial of her motion to re-open her Rule 29.15 post-conviction case.

* * *

In 1995, a jury found Ms. Eastburn guilty of murder in the first degree. *State v. Eastburn*, 950 S.W.2d 595, 597 (Mo.App. S.D. 1997). The facts of her crime—describing how she conspired with two co-actors to murder her former husband—are summarized in the opinion of the Court of Appeals. *Id.* at 599-603.¹ On August 22, 1995, the trial court sentenced Ms. Eastburn to life imprisonment without eligibility for probation or parole. *Id.* 597. Ms. Eastburn appealed. *See id.*

While her direct appeal was pending, Ms. Eastburn filed a post-conviction motion. *Id.* (Under the version of Rule 29.15 then in effect, Ms. Eastburn was required to file her post-conviction motion while her direct

¹ In her brief, Ms. Eastburn recites facts from her trial, but she does not state them in the light most favorable to the verdict (App.Br. 6-10). For instance, she omits the fact that she told her co-actors that, because of her ongoing relationship with the victim, she could arrange the murder: she said she could “go into the house and have him positioned by a window to where they could get a clean shot at him.” *State v. Eastburn*, 950 S.W.2d at 600.

appeal was pending. *See* Rule 29.15(b) (1995).) The motion court denied Ms. Eastburn's post-conviction motion after an evidentiary hearing. *Id.* Ms. Eastburn appealed, and the two appeals were consolidated. *Id.*

On appeal, Ms. Eastburn asserted trial court error in failing to *sua sponte* remove two members of the venire panel, and in admitting hearsay; both claims were denied. *Id.* at 597-605. Ms. Eastburn also alleged that her trial attorneys were ineffective for failing to move to strike a venireperson for cause; that claim, too, was denied. *Id.* at 605-608. The Court of Appeals, thus, affirmed Ms. Eastburn's conviction and sentence and affirmed the denial of her Rule 29.15 motion. *Id.* at 605, 608. The Court of Appeals issued its mandate on October 2, 1997.

About thirteen years later, on September 13, 2010, Ms. Eastburn filed a motion to re-open her post-conviction case (2nd PCR L.F. 1, 5).² The motion alleged that the case should be re-opened "due to the abandonment of appointed counsel from the public defender's office" (2nd PCR L.F. 5). The motion further alleged that the motion court should vacate Ms. Eastburn's conviction "to correct a manifest injustice" (2nd PCR L.F. 5).

² Inasmuch as this appeal is Ms. Eastburn second appeal from an order in her post-conviction case, respondent will cite to the record of the recent proceedings in this case as "2nd PCR L.F." and "2nd PCR Tr."

With regard to abandonment, the motion to re-open acknowledged that post-conviction counsel had filed a timely amended motion, but the motion alleged that the amended motion was “patently defective and thus constituted abandonment” because “appointed counsel abandoned claims that [Ms. Eastburn] wished to be raised in favor of much weaker claims that had little or no chance of success” (2nd PCR L.F. 11). The motion also alleged “a manifest injustice” because Ms. Eastburn, a juvenile, had been sentenced to life imprisonment without parole (2nd PCR L.F. 11-12).

After alleging both abandonment and manifest injustice, the motion to re-open also stated two claims. The first claim alleged that trial counsel had been ineffective for “failing to investigate and present available evidence from mental health professionals that [Ms. Eastburn] suffered from various mental disorders including post traumatic stress disorder, acute depression, and a low I.Q.” (2nd PCR L.F. 13). The second claim alleged that Ms. Eastburn’s “sentence of life without parole is barred by the United States Constitution and by international law” (2nd PCR L.F. 17).

In March, 2011, the parties agreed to “re-open” Ms. Eastburn’s post-conviction case (2nd PCR L.F. 1). A docket entry on March 1, 2011, states, “by agreement of parties, movant’s motion to reopen her previous 29.15 proceeding is granted” (2nd PCR L.F. 1).

On September 2, 2011, the state filed a motion to dismiss (2nd PCR L.F.

2). The state filed a brief in support of its motion (2nd PCR L.F. 2). Ms. Eastburn filed suggestions in opposition (2nd PCR LF. 2). (These pleadings have not been included in the record on appeal.) On October 6, 2011, the motion court held a hearing on the state's motion to dismiss (2nd PCR L.F. 2).

At the hearing on the motion to dismiss, Ms. Eastburn's attorney pointed out that the state had agreed to re-open the post-conviction case in March, 2011 (2nd PCR Tr. 5). In response, the prosecutor stated that in agreeing to re-open the post-conviction case, the state had not stipulated that Ms. Eastburn had been abandoned by post-conviction counsel, or that Ms. Eastburn had suffered a manifest injustice (2nd PCR Tr. 6). The prosecutor stated that he had agreed to re-open the case for an evidentiary hearing to determine whether Ms. Eastburn had been abandoned by post-conviction counsel (2nd PCR Tr. 6). The prosecutor stated that he had then filed a motion to dismiss "based on current case law" indicating that the court must "determine that there was abandonment by counsel" (2nd PCR Tr. 6). The prosecutor stated that he believed the court "should hear whether or not previous counsel . . . actually abandoned [Ms. Eastburn] in the 29.15 proceedings that took place shortly after the trial" (2nd PCR Tr. 6-7).

Ms. Eastburn's counsel stated that they were not prepared to proceed on the issue of abandonment and were instead "prepared to proceed on the merits of our claims" (2nd PCR Tr. 7).

The court then ascertained that various witnesses were present, and the court stated that, even if the court were to rule in the state's favor on the motion to dismiss, "it would be wise to make a record on the evidentiary hearing" (2nd PCR Tr. 8). The court stated that it would "just hear everything today, and then [it would] rule afterward" (2nd PCR Tr. 8). The court then stated that it would "take up the issue of abandonment and then the evidentiary hearing" on Ms. Eastburn's claims (2nd PCR Tr. 8).

Ms. Eastburn's attorney reiterated that he believed the state had already conceded abandonment by post-conviction counsel, and he reiterated that he did not have witnesses present to testify on that issue (2nd PCR Tr. 9). He asserted that the state have waived the issue of abandonment and should be estopped from raising it now (2nd PCR Tr. 9). He argued that the state should have "objected on March 1st to the agreement," and he argued that "once the [post-conviction] case is reopened, the merits of the case are fair game" (2nd PCR Tr. 9).

The prosecutor stated that the state's evidence on the issue of abandonment consisted of items in the record (2nd PCR Tr. 9). The motion court then took judicial notice of filings in the circuit court (2nd PCR Tr. 9). The motion court then took the issue of abandonment under advisement (2nd PCR Tr. 10).

After a brief recess, the prosecutor made a record of the state's

arguments from its motion to dismiss (2nd PCR Tr. 11). The prosecutor argued that there had been no abandonment by post-conviction counsel because Ms. Eastburn's previous post-conviction counsel had filed a timely amended motion pursuant to Rule 29.15 and the amended motion had not been "patently defective" (2nd PCR Tr. 11-12). The prosecutor, thus, argued that the motion court had no authority to consider Ms. Eastburn's new post-conviction claims because the motion was a successive Rule 29.15 motion (2nd PCR Tr. 12). The prosecutor also reiterated that while the state had agreed to re-open the 29.15 proceedings, the state had not agreed that Ms. Eastburn was, in fact, abandoned by post-conviction counsel (2nd PCR Tr. 12). The prosecutor, thus, argued that the motion court did not have "subject matter jurisdiction" to hear the case (2nd PCR Tr. 13).

Ms. Eastburn's counsel argued that, under *Crenshaw v. State*, 266 S.W.3d 257 (Mo. banc 2008), the motion court had "jurisdiction" over the case (2nd PCR Tr. 13). Ms. Eastburn's counsel then referred to off-the-record conversations that he had had with the prosecutor about re-opening the case, and he reiterated his argument that the state had waived "the issue of abandonment" (2nd PCR Tr. 14).

The motion court observed that the parties' agreement to re-open the case did not "have the language about any stipulation due to an abandonment" (2nd PCR Tr. 14). The motion court stated that "a record by

counsel was not made,” so it was not a settled question (2nd PCR Tr. 14). The court then reiterated that “because of judicial economy [the court was] going to go ahead and listen to the evidentiary hearing and then later determine whether or not there was any subject matter jurisdiction” (*i.e.*, whether there was abandonment by post-conviction counsel) (2nd PCR Tr. 14).

Ms. Eastburn’s counsel then acknowledged that no record had been made on March 1, 2011, but he complained that he had not been told that the conference would not be on the record (2nd PCR Tr. 16). He stated that he and the prosecutor had both appeared in court, and that they had “agreed to reopen the case” (2nd PCR Tr. 16). He pointed out that Ms. Eastburn’s only alleged grounds for re-opening the case were allegations of “abandonment of counsel and manifest injustice” (2nd PCR Tr. 16). Thus, he again argued that the state had waived those “affirmative defenses” (2nd PCR Tr. 16).

The prosecutor contested Ms. Eastburn’s counsel’s recollection and stated that the prosecutors were not present on March 1st when the court signed the order (2nd PCR Tr. 16-17). The prosecutor recalled being present at a subsequent hearing in August (2nd PCR Tr. 17). Ms. Eastburn’s counsel accused the prosecutor of having a “convenient lapse of memory,” and the court stated that it had no independent memory of who was present (PCR Tr. 17). The court recalled only that a “stipulation” had been submitted, and that the court had signed the order (2nd PCR Tr. 17). Ms. Eastburn’s attorney

reiterated his belief that the prosecutor had been present when the order was signed (2nd PCR Tr. 17).

As suggested by the motion court (as a matter of judicial economy), Ms. Eastburn presented evidence in support of her new post-conviction claims. She first called Frank Yankoviz, one of her trial attorneys (2nd PCR Tr. 18, 20). Next, Ms. Eastburn testified (2nd PCR Tr. 70). The court then adjourned so that arrangements could be made for the state's witness, Judge Victor Head, to testify at a later date (2nd PCR Tr. 96-98).

On February 28, 2012, the hearing continued (2nd PCR Tr. 99). Judge Head, who had also been one of Ms. Eastburn's attorneys at trial, testified at that time (2nd PCR Tr. 100). Ms. Eastburn then called her mother, Alicia Blevins, as a rebuttal witness (2nd PCR Tr. 138-139).

At the conclusion of the hearing, Ms. Eastburn's counsel pointed out that the United States Supreme Court had recently granted petitions for writs of certiorari in two cases "to determine whether it's unconstitutional to sentence a juvenile to life without parole" (2nd PCR Tr. 142). The parties, thus, agreed that "it would be prudent to keep the case open" until July when the disposition of those cases would be known (2nd PCR Tr. 142-143).

On June 25, 2012, the United States Supreme Court handed down its decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

On July 10, 2012, the motion court stated that the parties would be

allowed to submit proposed judgments (2nd PCR L.F. 3). On July 30, 2012, Ms. Eastburn submitted proposed findings of fact and conclusions of law (2nd PCR L.F. 3). On August 20, 2012, the state submitted its proposed findings and conclusions (2nd PCR L.F. 3).³

On September 21, 2012, the motion court entered a judgment, but on October 1, 2012, Ms. Eastburn filed a motion to amend the judgment (2nd PCR L.F. 3, 26-32). The state filed a response,⁴ and on October 5, 2012, the motion court entered an amended judgment (2nd PCR L.F. 4, 33-34).

In its amended judgment, the motion court concluded that the March 1, 2011, agreement resulted in the motion court “returning the Rule 29.15 motion to an active docket” (2nd PCR L.F. 33). The motion court stated that the agreement to “re-open” the case was “a misnomer,” and the court found that the parties’ agreement “was, in reality an agreement to allow movant to file a successive Rule 29.15 motion” (2nd PCR L.F. 33). The court then observed that Rule 29.15(l) expressly prohibits successive motions; and, drawing support from this Court’s recent decision in *Dorris v. State*, 360 S.W.3d 260 (Mo. banc 2012), the court concluded that the state could not

³ The state also filed a “Motion to Reconsider” (2nd PCR L.F. 3). The record does not disclose what this motion pertained to.

⁴ The state’s response has not been included in the record on appeal.

waive the rule's prohibition against successive motions (2nd PCR L.F. 33-34).⁵ The motion court concluded that it had a duty to enforce the provisions of Rule 29.15, and, accordingly, it denied Ms. Eastburn's motion (2nd PCR L.F. 34). The court observed in passing the recent decision in *Miller v. Alabama*: "Court notes that under Miller v. Alabama 132 S.Ct. 2455 (2012) that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" (2nd PCR L.F. 34).

On October 24, 2012, Ms. Eastburn filed her notice of appeal (2nd PCR L.F. 4, 37).

⁵ Ms. Eastburn's post-conviction case is governed by Rule 29.15 (1995). Under that version of the rule, subdivision (k) prohibited successive motions. Rule 29.15(k) (1995).

ARGUMENT

I.

The motion court did not clearly err in denying Ms. Eastburn’s motion to re-open her Rule 29.15 case. (Responds to Points I-III of the appellant’s brief.)

The sole issue in this case is whether the motion court clearly erred in denying Ms. Eastburn’s post-conviction motion as a successive post-conviction motion (*see* 2nd PCR L.F. 33-34). Thus, as will be set forth below, most of Ms. Eastburn’s claims are not properly before this Court in this appeal.

A. The standard of review

“Review of a motion court’s overruling of a motion to reopen postconviction proceedings is limited to a determination of whether the motion court’s findings and conclusions are clearly erroneous.” *Gehrke v. State*, 280 S.W.3d 54, 56 (Mo. banc 2009). “A motion court’s findings and conclusions are clearly erroneous only if the Court, after reviewing the entire record, is left with the definite and firm impression that a mistake has been made.” *Id.* at 56-57.

B. The existence of a meritorious claim would not provide a basis for re-opening Ms. Eastburn’s post-conviction case

In her first point, Ms. Eastburn asserts that “the motion court clearly erred in denying [her] motion . . . on procedural grounds because the record

conclusively establishes that [Ms. Eastburn's] first degree murder conviction and sentence of life without parole violate the Eighth Amendment because she was under eighteen years of age when the offense occurred" (App.Br. 18).⁶ She argues, "In *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the Supreme Court ruled that the Eighth Amendment forbids a sentencing scheme that mandates a sentence of life in prison without the possibility of parole for juvenile offenders" (App.Br. 18).

But Ms. Eastburn's argument provides no basis for concluding that the motion court clearly erred. The alleged merit of Ms. Eastburn's constitutional claim is irrelevant to determining whether Ms. Eastburn's post-conviction motion was a successive post-conviction motion, whether the post-conviction case should have been re-opened, or whether Ms. Eastburn was abandoned by post-conviction counsel. Thus, Ms. Eastburn's arguments on Point I fail to address the threshold issue in this case: whether her post-conviction case—which had been final for approximately thirteen years—was the appropriate avenue for seeking post-conviction relief in the wake of *Miller v. Alabama*.

⁶ Ms. Eastburn asserts that this Court should review her claim *de novo* (App.Br. 18). But the judgment in this case did not implicate or uphold the constitutionality of any statute, and no constitutional challenge was considered by the motion court (2nd PCR L.F. 33-34).

Ms. Eastburn asserts that “[s]ince it is undisputed that [she] was convicted and sentenced to life without parole for the crimes of first degree murder as mandated by Missouri statute for an offense committed when she was seventeen (17) years old, she is entitled to some form of post-conviction relief under *Miller*” (App.Br. 19). Even assuming for the sake of argument that Ms. Eastburn is correct (and respondent does not concede that *Miller* should be applied retroactively in cases that are already final⁷), she must still seek post-conviction relief in an appropriate forum, and according to the rules that govern post-conviction actions in Missouri. It is not sufficient to simply select a post-conviction proceeding at random and allege a meritorious claim.

In short, the Court should not determine in this case whether *Miller* is retroactive, and it need not devise a remedy for the alleged constitutional violation. Likewise, the Court should not consider Ms. Eastburn’s claim of

⁷ Some courts have concluded that *Miller v. Alabama* is not retroactive. See *Craig v. Cain*, 2013 WL 69128 (5th Cir. 2013) (not retroactive; not reported in F.3d reporter); *People v. Carp*, ---N.W.2d ----, 2012 WL 5846553 (Mich.App. 2012) (not retroactive); *Geter v. State*, --- So.3d ----, 2012 WL 4448860 (Fla.App. 2012) (not retroactive). But see *State v. Simmons*, 99 So.3d 28 (La. 2012) (allowing for resentencing on collateral review in light of *Miller*); *People v. Morfin*, 981 N.E.2d 1010 (Ill.App. 2012) (*Miller* retroactive).

ineffective assistance of trial counsel (asserted in Point III). It is neither appropriate nor necessary to consider the alleged merits of Ms. Eastburn's constitutional claims in this case because the motion court determined that it lacked authority under Rule 29.15 to consider Ms. Eastburn's successive post-conviction motion and the claims alleged therein (2nd PCR L.F. 33-34). Points I and III should be denied.

C. Successive post-conviction motions are prohibited under Rule 29.15, and Ms. Eastburn's motion to re-open was properly denied on various grounds

Under the terms of Rule 29.15, "[t]he circuit court shall not entertain successive motions." Rule 29.15(k) (1995). Thus, because the motion court found that Ms. Eastburn's motion to re-open was a successive motion, it was barred by Rule 29.15. "'A motion is successive if it follows a previous post-conviction relief motion addressing the same conviction.'" *Zeigenbein v. State*, 364 S.W.3d 802, 804 (Mo.App. S.D. 2012) (quoting *Turpin v. State*, 223 S.W.3d 175, 176 (Mo.App. W.D. 2007)).

Ms. Eastburn asserts in Point II that her motion was not a successive motion "because the parties and the motion court, by agreement, reopened [her] first timely-filed 29.15 motion and, as a result, any possible procedural bar defenses were expressly waived and the motion court therefore had the authority and duty to address all of the issues presented in the case" (App.Br.

24). She asserts, “Once the parties and the motion court agreed to re-open [her] initial Rule 29.15 motion, the motion court below had the authority and obligation to address the merits of the underlying claims for relief” (App.Br. 26). But this argument is neither factually nor legally correct.

The parties did not agree to “re-open” the original case as asserted by Ms. Eastburn. To the contrary, the motion court found that the agreement to “re-open” (entered into on March 1, 2011) was not, in fact, an agreement to re-open the post-conviction case (2nd PCR L.F. 33). The motion court found that referring to the agreement as an agreement to “re-open” the case was a “misnomer” (2nd PCR L.F. 33). The court found that in light of the agreement, the court had “entered an order returning the Rule 29.15 motion to an active docket” (2nd PCR Tr. 33). The motion court found, however, that the agreement “was, in reality an agreement to allow movant to file a successive Rule 29.15 motion” (2nd PCR L.F. 33). The motion court did not clearly err in making these findings.

A docket entry on March 1, 2011, states, “by agreement of parties, movant’s motion to reopen her previous 29.15 proceeding is granted” (2nd PCR L.F. 1). The record shows, however, that the state subsequently filed a motion to dismiss Ms. Eastburn’s motion (2nd PCR L.F. 2).

The motion court held a hearing on the state’s motion to dismiss, and the prosecutor stated that the state had never stipulated that Ms. Eastburn

had been abandoned by post-conviction counsel, or that Ms. Eastburn had suffered a manifest injustice (2nd PCR Tr. 6). The prosecutor stated that he had agreed to re-open the case for an evidentiary hearing to determine whether Ms. Eastburn had been abandoned by post-conviction counsel (2nd PCR Tr. 6). The prosecutor stated that he had then filed a motion to dismiss “based on current case law” indicating that the court must “determine that there was abandonment by counsel” (2nd PCR Tr. 6). The prosecutor stated that he believed the court “should hear whether or not previous counsel . . . actually abandoned [Ms. Eastburn] in the 29.15 proceedings that took place shortly after the trial” (2nd PCR Tr. 6-7).

After further discussion and argument by the parties, the motion court observed that the parties’ agreement to re-open the case did not “have the language about any stipulation due to an abandonment” (2nd PCR Tr. 14). The motion court stated that “a record by counsel was not made,” so it was not a settled question (2nd PCR Tr. 14). The court then stated that “because of judicial economy [the court was] going to go ahead and listen to the evidentiary hearing and then later determine whether or not there was any subject matter jurisdiction” (*i.e.*, whether there was abandonment by post-conviction counsel) (2nd PCR Tr. 14).

Ms. Eastburn’s counsel acknowledged that no record had been made on March 1, 2011, but he complained that he had not been told that the

conference would not be on the record (2nd PCR Tr. 16). He stated that he and the prosecutor had both appeared in court, and that they had “agreed to reopen the case” (2nd PCR Tr. 16). He pointed out that Ms. Eastburn’s only alleged grounds for re-opening the case were allegations of “abandonment of counsel and manifest injustice” (2nd PCR Tr. 16). Thus, he again argued that the state had waived those “affirmative defenses” (2nd PCR Tr. 16).

The prosecutor contested Ms. Eastburn’s counsel’s recollection and stated that the prosecutors were not present on March 1st when the court signed the order (2nd PCR Tr. 16-17). The prosecutor recalled being present at a subsequent hearing in August (2nd PCR Tr. 17). Ms. Eastburn’s counsel accused the prosecutor of having a “convenient lapse of memory,” and the court stated that it had no independent memory of who was present (PCR Tr. 17). The court recalled only that a “stipulation” had been submitted, and that the court had signed the order (2nd PCR Tr. 17). Ms. Eastburn’s attorney reiterated his belief that the prosecutor had been present when the order was signed (2nd PCR Tr. 17).

Based on this record, the motion court did not clearly err in concluding that the parties had not agreed to re-open the case on the grounds asserted in Ms. Eastburn’s motion to re-open. The stipulation provided to the motion court did not contain any agreement on the issue of abandonment, and the record shows that the prosecutor moved to dismiss the motion on the grounds

that Ms. Eastburn had *not* been abandoned (*see* 2nd PCR Tr. 11-12).

In short, while it is apparent that the parties believed that the case should be taken up by the court—either because Ms. Eastburn had been abandoned (as Ms. Eastburn alleged), or to determine whether there was abandonment (as the prosecutor suggested)—there is nothing in the record showing that the state agreed that Ms. Eastburn had been abandoned. Accordingly, the motion court did not clearly err in finding that, in effect, the parties had merely agreed to proceed on a successive post-conviction motion. And because successive motions are prohibited by Rule 29.15, the motion court did not clearly err in refusing to consider it.

Alternatively, even if the motion was not “successive” as contemplated by Rule 29.15(k) (1995), it was plainly an untimely amended motion. “It is well-settled that the time limitations set forth in the rules governing post-conviction relief are reasonable and mandatory.” *State v. Isaiah*, 874 S.W.2d 429, 434 (Mo.App. W.D. 1994) (citing *State v. Ervin*, 835 S.W.2d 905, 929 (Mo. banc 1992)). “The time limitations of Rule 29.15 ‘serve the legitimate end of avoiding delay in the processing of prisoner claims.’” *Id.* “The maximum time allowed to file an amended motion under Rule 29.15(f) is sixty days from the date counsel is appointed.” *Id.* “The motion court does not have discretion to grant extensions beyond the time limits set forth in the rule.” *Id.* (citing *State v. Six*, 805 S.W.2d 159, 170 (Mo. banc 1991)).

Here, absent any factual finding that Ms. Eastburn was abandoned by post-conviction counsel, Ms. Eastburn's motion was either a successive post-conviction motion or an untimely amended motion. And even if the parties had been willing to attempt to litigate such a motion, the motion court was not required to exceed the authority granted to it by Rule 29.15. Under the rule, and according to well-settled case law, the motion court did not have discretion to permit an untimely amended motion approximately thirteen years after the post-conviction case became final. As such, the motion court did not clearly err in concluding that it could not consider Ms. Eastburn's motion. *See Kubley v. Brooks*, 141 S.W.3d 21, 27 n. 5 (Mo. banc 2004) ("Although the trial court reached this result on a different ground, we will affirm where it reached the right result, even if for the wrong reason.").

Ms. Eastburn places great reliance on the state's alleged agreement to re-open the case in light of the alleged abandonment (App.Br. 26). As discussed above, however, there was no such waiver. But even if there had been an initial waiver, Ms. Eastburn's reliance on that waiver is misplaced.

This Court's rules were not adopted as recommended guidelines that can be disregarded by the parties for their own purposes. Rather, "Court rules serve the purpose of implementing a remedy for a violation of a right and to 'provide a pattern of regularity of procedure within the court, to facilitate the effective flow of information, and to enable the court to rule on

the merits of the case, in a speedy and inexpensive manner.’” *Swofford v. State*, 323 S.W.3d 60, 63 (Mo.App. E.D. 2010) (quoting 21 C.J.S. Courts § 179 (2006)). “‘When properly adopted, the rules of court are binding on courts, litigants, and counsel, and it is the court’s duty to enforce them.’” *Id.* (quoting *Sitelines, L.L.C. v. Pentstar Corp.*, 213 S.W.3d 703, 707 (Mo.App. E.D. 2007)).

It has long been recognized that “parties cannot waive compliance with court rules.” *Id.* More than a century ago, this Court stated:

If counsel by expressed agreement, or even a tacit agreement, can obviate our rules, the efficacy thereof would be destroyed. It is not within the power of counsel by agreement, either expressed or implied, to obviate the provisions of the rules of this court. Those rules were established with the purpose of facilitating the business of the court, and to permit counsel to obviate the effect thereof by either a tacit or expressed agreement would leave the court powerless.

Hays v. Foos, 122 S.W. 1038 (1909). In short, the motion court did not clearly err when it recognized, and enforced, a limitation placed by this Court’s rules upon its authority to act.

Additionally, while Ms. Eastburn suggests that the pleading and waiver provisions of Rule 55 should be imported into cases where a movant

files a motion to re-open pursuant to Rule 75.01, there is no compelling reason to do so. To the contrary, Missouri courts have held that certain provisions of Rule 55 are not consistent with the aims of Missouri's post-conviction rules. *See, e.g., Pettry v. State*, 345 S.W.3d 335, 339 (Mo.App. E.D. 2011) ("We find no basis for holding that Rules 55.01, 55.08 or 55.27 are applicable to proceedings filed pursuant to Rule 24.035 because no responsive pleading is required to a motion seeking post-conviction relief under Rule 24.035."); *see also Rohwer v. State*, 791 S.W.2d 741, 742 (Mo.App. W.D. 1990) (holding that trial of issues by "implied consent pursuant to Rule 55.33(b) is not consistent with Rule 29.15"); *see generally Dorris v. State*, 360 S.W.3d 260, 268-269 (Mo. banc 2012) (distinguishing between the waiver that occurs under Rule 29.15 or Rule 24.035 and the waiver that accompanies a failure to adhere to the pleading requirements of Rule 55.08 and 55.27(a)).

There is no rule requiring a responsive pleading to a motion to re-open under Rule 75.01. Accordingly, it would not be appropriate to import the pleading requirements of Rule 55 into cases where a litigant is seeking to re-open a post-conviction case. *See generally Pettry v. State*, 345 S.W.3d at 339 ("If no responsive pleading is required, the State's failure to file a responsive pleading cannot constitute a waiver of its right to claim that the movant waived his right to pursue post-conviction relief."). Indeed, because a litigant seeking to re-open a post-conviction case is operating outside the rules (or is

seeking an exception to the rules), the burden should be on the post-conviction litigant to both plead and ultimately prove that an exception to the otherwise mandatory time limits should be invoked by the court. *See Dorris v. State*, 360 S.W.3d at 267. Moreover, any failure by the state to assert contrary arguments, or any agreement by the state that might circumvent the rules, should not preclude the motion court from enforcing the rules. *See generally id.* at 267, 270.

As a final matter, because Ms. Eastburn did not allege sufficient facts showing (and also did not prove) abandonment by post-conviction counsel, the motion court had no authority to re-open her post-conviction case. A basic constraint on the motion court's authority to act in this case was Rule 75.01. That rule states that "[t]he trial court retains control over judgments during the thirty-day period after entry of judgment and may, after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend, or modify its judgment with that time." Rule 75.01 (1995). Here, of course, approximately thirteen years had gone by since the case was final.

This Court has recognized an exception to the thirty-day time limit of Rule 75.01 in cases of abandonment by post-conviction counsel. *See Crenshaw v. State*, 266 S.W.3d 257, 259 (Mo. banc 2008) (citing *Edgington v. State*, 189 S.W.3d 703, 706 (Mo.App. W.D. 2006)). Here, however, the motion to re-open did not allege facts showing abandonment, Ms. Eastburn did not prove

abandonment, and the motion court made no finding that Ms. Eastburn was actually abandoned.

In relation to filing an amended motion, “in general abandonment is available ‘when (1) post-conviction counsel takes no action on a movant’s behalf with respect to filing an amended motion and as such the record shows that the movant is deprived of a meaningful review of his claims; or (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner.’” *Id.* (quoting *Barnett v. State*, 103 S.W.3d 765, 773-774 (Mo. banc 2003)).

Ms. Eastburn’s motion to re-open acknowledged that post-conviction counsel filed a timely amended motion, but the motion alleged that the amended motion was “patently defective and thus constituted abandonment” because “appointed counsel abandoned claims that [Ms. Eastburn] wished to be raised in favor of much weaker claims that had little or no chance of success” (2nd PCR L.F. 11). But omitting claims from the amended motion that the movant wanted counsel to include does not constitute abandonment. *See Winfield v. State*, 93 S.W.3d 732, 738-739 (Mo. banc 2002) (declining to expand abandonment to include “materially incomplete action” by post-conviction counsel based, in part, on counsel’s failing to include certain claims in the amended motion); *Volner v. State*, 253 S.W.3d 590, 593 (Mo.App. S.D. 2008) (“Movant’s allegations in his motion [to re-open], which we assume as

true—that post-conviction counsel omitted from the amended motion a claim asserted by Movant in his *pro se* motion—fit neither characterization of abandonment by post-conviction counsel as so defined by our Supreme Court.”); *see also Smith v. State*, 215 S.W.3d 749, 750-751 (Mo.App. W.D. 2007) (counsel did not abandon the movant by failing to include a claim that the movant asserted should have been included); *Kennedy v. State*, 210 S.W.3d 417, 420 (Mo.App. S.D. 2006) (counsel did not abandon the movant in a Rule 27.26 case by failing to include all claims communicated to him by the movant). Rather, such claims are merely claims of perceived ineffective assistance of post-conviction counsel, and they are categorically unreviewable. *See Gehrke v. State*, 280 S.W.3d at 58.⁸

On appeal, Ms. Eastburn does not make any argument that she was, in fact, abandoned; instead, she relies on the state’s alleged waiver of the

⁸ In her motion to re-open, Ms. Eastburn relied on *Dudley v. State*, 254 S.W.3d 109 (Mo.App. W.D. 2008). But in *Dudley*, post-conviction counsel filed an unverified amended motion, which, at the time it was filed, was a legal “nullity” under Missouri law. *Id.* at 111-112. As a consequence, the motion in *Dudley* was denied because it failed to invoke the court’s jurisdiction. *Id.* Here, the amended motion was not a nullity; rather, it resulted in litigation and review of Ms. Eastburn’s claims.

abandonment issue (App.Br. 26). But, as discussed above, the record does not demonstrate a waiver of the abandonment issue, and the motion court made no finding of either a waiver or actual abandonment. Additionally, at the evidentiary hearing, Ms. Eastburn failed to present any evidence on the issue of abandonment, and she instead argued that the issue had been waived (*see* 2nd PCR Tr. 7, 9, 14). (Ms. Eastburn may point out that she was unprepared to present such evidence at the evidentiary hearing, but while that was true on the first day of the hearing, it was not true on the second day, four and a half months later.)

In short, a review of the record reveals that Ms. Eastburn did not allege or prove facts showing abandonment, and that the motion court made no finding that she was actually abandoned by post-conviction counsel. Accordingly, the motion court lacked authority to re-open the case, and the time limit of Rule 75.01 provides another basis for upholding the motion court's ruling. Point II should be denied.

CONCLUSION

The Court should affirm the denial of Ms. Eastburn's motion to re-open her Rule 29.15 case.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 6,223 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System this 22nd day of March, 2013, to:

KENT E. GIPSON
Law Office of Kent Gipson, LLC
121 East Gregory Boulevard
Kansas City, MO 64114
Tel.: (816) 363-4400
Fax: (816) 363-4300
kent.gipson@kentgipsonlaw.com

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent